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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEONARD LEE A/K/A LEONARD VALENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI OR REMANDMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated when the United States Court of Appeals for the Seventh Circuit failed to address an issue raised on appeal and based its decision on misstatements of the evidence adduced at trial.

2. Whether the district court erred in instructing the jury that the jurisdictional amount could be established by considering the retail value of the goods and the Seventh Circuit also erred in determining that valuation at retail was appropriate where the goods, if stolen, were taken in a wholesale market and properly valued at wholesale could not satisfy the jurisdictional amount.

3. Whether petitioner's conviction for conspiracy to violate 18 U.S.C. § 2314 can stand where the government failed to prove that petitioner agreed to commit acts which included all of the elements of a crime under Section 2314.

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OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction was entered on November 17, 1982. A copy of that decision is attached hereto as Appendix A. A petition for rehearing was timely filed and was denied on March 9, 1983. A copy of the order denying the petition for rehearing is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V

> No person shall . . . be deprived of life, liberty or property, without due process of law.

18 U.S.C. § 371

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2314

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

Petitioner, Leonard Valente, was charged in a two-count indictment by the Special March 1980 Grand Jury in the Northern District of Illinois, Eastern Division. Count One charged petitioner, pursuant to Section 371 of Title 18, United States Code, with conspiracy to violate

Section 2314 of Title 18, United States Code (interstate transportation of stolen property). Count Two charged petitioner with the substantive offense of violating Section 2314 of Title 18, United States Code. The basis for these charges was petitioner's shipment and sale of allegedly stolen television parts to Tuner Service Company, Rochester, New York, in the latter half of 1976. Jury verdicts of guilty were returned on both counts. Petitioner's post-trial motion for new trial was denied. On March 4, 1982, final judgment was entered against petitioner. It was ordered that petitioner be imprisoned for five years on Count One and seven years on Count Two, sentences to run concurrently.

STATEMENT OF THE FACTS

Petitioner operated Color Television Research, ("Color TV") a television repair shop. (Tr. 79, 83.) In operating this business he purchased many television parts from a number of sources, including Zenith Distributing Company, North Lake, Illinois and Union Electric. (Tr. 85, 285, 299.) Petitioner purchased these parts at a price less than retail. (Tr. 287.) This was consistent with Zenith's practice of selling parts to individuals in the business of servicing television sets at wholesale. (Tr. 643, 645.) Petitioner used certain of these parts for Color TV's repair business and sold others to television repair shops. (Tr. 287.) During the latter half of 1976, petitioner on numerous occasions shipped television parts to Tuner Service, Rochester, New York.

The basis of the charges against petitioner was the government's allegation that the parts sent to Tuner Service were stolen. The only evidence of this was presented by government witness John Urbanik, a former Color TV employee. Urbanik testified that petitioner purchased stolen Zenith television parts from Zenith employees. According to Urbanik, petitioner initially purchased stolen parts from a man named Michael Dopson and later from three men named Otis, Larry and Benny. Urbanik's testimony that petitioner purchased stolen parts, however, was based almost entirely on uncorroborated hearsay statements. The government did not call to testify any of the four alleged thieves. Their absence never was explained; Dopson even was in court pursuant to subpoena. Further, Larry and Otis never were identified at trial. Moreover, Urbanik admitted that petitioner purchased parts from legitimate sources. Concerning the parts shipped to Rochester, Urbanik only could "estimate" which portion was stolen.

At trial, the government called a number of Zenith managers and employees. None could establish that the parts shipped to Rochester were stolen. Moreover, the parts which were the trial exhibits could not be identified as stolen. The government presented no evidence that Zenith was missing television parts.

The evidence showed that the retail value of the parts shipped to Rochester in November and December, 1976 (the subjects of Count II) was $5,262.91. (R. 616.) The wholesale value of these parts never was established but the evidence showed that the wholesale price was substantially less than retail. (R. 643.)

REASONS FOR GRANTING THE WRIT OR REMANDMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I.

PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, IN AFFIRMING THE CONVICTION, NEVER ADDRESSED AN ARGUMENT RAISED ON APPEAL AND MISSTATED THE EVIDENCE ADDUCED AT TRIAL.

The due process right to a hearing encompasses the right to a hearing that is meaningful, not merely a hearing in form but one of substance. *Cf: Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963). Concerning the first appeal of right in the federal system, the due process hearing requirement surely must include a reasoned judgment upon the issues presented for review. As this Court has recognized:

> the requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning steps.

Id. quoting *Morgan v. United States*, 304 U.S. 1, 20.

In the case at bar, petitioner admittedly presented briefs and engaged in oral argument before the Seventh Circuit. But a "full hearing" requires more than that. *Cf: Id.* The Seventh Circuit's opinion in the present case impels the conclusion that petitioner's hearing was one only of form. In affirming petitioner's conviction, the court never addressed an issue raised on appeal which was dispositive of Count II of the indictment, to wit: whether the government proved the *corpus delecti* of the

offenses charged. Specifically, petitioner maintained, *inter alia*, that the government failed to present any competent evidence that the merchandise described in Count II was stolen property.

Rather than addressing petitioner's claim that the government failed to present any competent evidence that the merchandise described in Count II of the indictment was stolen property, the Seventh Circuit recast this claim as one contesting the sufficiency of the evidence. After setting out the "Statement of the Question on Appeal," the court concluded, "This challenges the sufficiency of the evidence to support the verdict of the jury." (App. A-3.)

The Seventh Circuit erred when it presented the issue in terms of the sufficiency of the evidence because petitioner never urged the reversal of his conviction on this basis. Rather, petitioner contended that his conviction was improper because the government failed to introduce *any* competent evidence to prove an essential element of the offense charged, to wit: that the goods were stolen. By failing to address whether the government presented any competent evidence that the goods in question were stolen, the Seventh Circuit violated petitioner's right to due process.

As this Court is aware, whether the weight of the evidence was sufficient to sustain a conviction and whether the government presented any competent evidence to prove an essential element of an offense are not the same question. Whether the government presented any competent evidence of an essential element is the threshold question. If that cannot be answered in the affirmative, the inquiry must end. Only after it is determined that at least some competent evidence has been presented can the question of the sufficiency of that evi-

dence, as it relates to the government's burden of proof, be addressed.[1]

The Seventh Circuit ignored petitioner's claim that no competent evidence was introduced to establish that the goods were stolen by subsuming this claim into the general sufficiency question. As discussed above, because they are separate and distinct, a merging of these two issues was improper. The court was able to merge these issues only by *assuming* that the goods were stolen. As will be detailed below, the court based its assumption that the goods were stolen upon a serious misapprehension of the facts adduced at trial.

Addressing issues not raised on appeal has been held grounds for reversal by this Court. *Cf: Price v. Johnson*, 334 U.S. 266 (1948) (reversal where Circuit Court of Appeals failed to decide issue raised in habeas corpus petition and dismissed petition solely on grounds of abuse of the writ). Likewise, the practice of inaccurately stating the issues presented for review has been condemned by members of this Court. For example, in *Gelbard v. United States*, 408 U.S. 41 (1972), a civil contempt proceeding against witnesses before federal grand juries who refused to comply with court orders to testify, the defense was that the grand jury interrogation was to be based upon information obtained from communications allegedly intercepted by federal agents by means of wiretapping and electronic surveillance in violation of 18 U.S.C. § 2515. The majority held that grand jury witnesses are entitled to invoke the prohibitions of

[1] For example, the government may introduce some evidence on a particular element but that may be insufficient to satisfy the government's burden of proof. If, however, the government presents *no* competent evidence on that element, the question of sufficiency never arises.

§ 2515 as a defense to contempt charges for refusal to testify. 408 U.S. at 43.

Writing for the dissenting justices, Justice Rehnquist criticized the majority for formulating the issues inaccurately. He said that the majority stated the question to be whether witnesses threatened with contempt

> are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusal to testify . . . *The question as thus framed by the court* has been so abstracted and refined, and divorced from the particulars of these two cases, as to *virtually invite the erroneous answer that the opinion of the Court gives.*

408 U.S. at 71. (Emphasis supplied.) In the case at bar, the Seventh Circuit engaged in a similar type of conduct. The court ignored an issue raised on appeal. Instead, the court chose to decide a wholly different question, and to do so in such a way that the outcome, affirmance, would be assured.

In the present case, the only competent evidence linking petitioner to the merchandise in question, Zenith television parts, failed to establish that the goods were stolen. The only evidence of petitioner's alleged receipt of stolen goods was the hearsay testimony of John Urbanik, a former employee of petitioner's company, Color TV Research.[2] Because Urbanik's testimony that petitioner purchased stolen television parts was hearsay, it was not competent to establish petitioner's guilt.

Urbanik testified that petitioner first received stolen parts from Michael Dopson, an employee in the Zenith

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[2] Urbanik testified to an extensive prior criminal record. (R. 266-267.) At the time of petitioner's trial, Urbanik was serving a 25 year prison sentence. (R. 269.)

Parts Department, and later purchased stolen parts from three men named Otis, Benny and Larry. Urbanik said that in July, 1976, petitioner began purchasing parts from Dopson. According to Urbanik, he was told by Dopson that the parts were stolen. Dopson did not discuss the details of the theft with petitioner. Dopson only told petitioner that Dopson did not pay for the parts. Urbanik, however, later contradicted even this portion of his testimony. On direct examination Urbanik stated:

> The first few shipments were before Otis, Larry and Benny started visiting Color Television Research; and since we had a small quantity of legitimate Zenith parts in stock, one or two of them might have went into the early shipments because we were shipping boxed parts at that time, as Michael Dopson was delivering boxed parts.

(R. 347.) Urbanik apparently testified that the parts delivered by Dopson, prior to the shipments received by Otis, Larry and Benny, were legitimately purchased boxed parts.

In any event, Urbanik's testimony on this point established, at most, criminal intent. Urbanik's testimony did not prove that the parts actually were stolen. In fact, Urbanik later testified that the parts listed on the billing invoices to Tuner Service were not all stolen parts. Rather, he "estimated" for the government those parts which were stolen and those which were not stolen.

Urbanik testified that Dopson stopped delivering parts in the second week of August, 1976, because Dopson had been fired from Zenith. Urbanik never explained why Dopson was fired. There was no evidence at trial that Dopson was dismissed because of improper or illegal conduct.

Dopson, the only witness who competently could have identified the source of the parts he delivered to petitioner, was not called to testify by the government. Dopson was in court pursuant to government subpoena. (R. 512.) Dopson had testified pursuant to a grant of immunity before a federal grand jury. (R. 513.) The government did not call him to testify at trial because "he disagrees with what some of the witnesses have said and have testified to" and, therefore, "he may perjure himself." (R. 513.)[3]

Before the grand jury, however, Dopson had testified that he never dealt with petitioner at all. (R. 513.) Without Dopson's testimony, Urbanik's testimony concerning Dopson's deliveries to Color TV Research was not competent to establish any improprieties in Dopson's dealings with that company. Moreover, Urbanik's testimony concerning Dopson's dealings with petitioner was not supported by Dopson's immunized statements before the grand jury.

Urbanik also testified concerning certain transactions with the alleged thieves, Larry, Benny and Otis. Urbanik, however, could not establish the identity of these men. Nor did Urbanik testify that petitioner was told by Larry, Benny or Otis that the television parts they sold were stolen. The record contains no direct evidence concerning the source of Otis' and Larry's parts. And although the record is replete with hearsay references to their activities, neither Larry, Otis or Benny was sub-

[3] This statement was made to the court on Friday afternoon at 5:00 p.m. (R. 514.) Petitioner's counsel repeatedly had been told by the government that Dopson would testify. That Dopson would be called was the government's justification for eliciting hearsay testimony from Urbanik and others regarding Dopson's activities.

poenaed to testify by the government and it never explained why they were not called.

Further, no direct evidence that petitioner purchased stolen parts was adduced from any of the other government witnesses. A former Color TV employee, Marie Angel, offered no direct evidence on this point. Nor did the Zenith managers and employees who were called to testify present any direct evidence that petitioner received goods which were stolen.[4]

The circumstantial evidence adduced at trial also failed to establish that the television parts were stolen. As noted above, the alleged thieves—Dopson, Larry, Otis and Benny—never were called to testify at trial. Further, Larry and Otis never were identified. There was no proof that the "Larry" whom Zenith employee Shirley Robinson observed taking parts from the Zenith plant was the same Larry who sold the same Zenith parts to petitioner. Likewise, there was no evidence that Robinson was "the purse," the woman who removed parts from the Zenith plant in her handbag. Although the government attempted to raise the inference that Robinson was "the purse" through Urbanik's hearsay testimony, at best, the government impermissibly raised an unsupported suspicion.

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[4] John Kimbrough, a former Zenith stockman, testified that he attempted to steal some parts, was apprehended and agreed to work with the F.B.I. to save his job. Zenith resupplied Kimbrough and an F.B.I. agent with parts which they sold to petitioner. The case law, however, is well established that a purchase under these circumstances is not the receipt of stolen goods for the purchaser is not actually receiving stolen property. *E.g.: United States v. Dove*, 629 F.2d 325, 327 (4th Cir. 1980); *United States v. Cohen*, 274 F.2d 596, 599 (3d Cir. 1921).

Nor was there any evidence that the Zenith parts which were the trial exhibits were stolen. These parts had no identifying marks and could not be traced because they had no serial numbers or other identifying marks. Further, there was no evidence that Zenith was missing any television parts.

Thus, while the government attempted to elicit testimony to establish that petitioner purchased and resold stolen Zenith parts, no competent evidence on this point was introduced. In fact, the only direct evidence regarding petitioner's acquisition of parts indicated that he legitimately purchased and inventoried television parts from Zenith in Northlake, Illinois and from Union Electric. The government did not produce any witness who competently could establish that the parts shipped to Rochester, New York were not legitimately purchased.

Because the government did not provide any competent evidence that the Zenith television parts described in the indictment were stolen, an essential element of a Section 2314 prosecution, petitioner's conviction on Count II of the indictment should have been reversed. By failing to address the threshold question of whether *any* competent evidence was presented to establish that the goods were stolen and by deciding only that the evidence was sufficient to sustain the conviction based upon the erroneous *assumption* that the parts were stolen, the Seventh Circuit violated petitioner's right to due process.

The Seventh Circuit assumed that the television parts were stolen based upon a serious misapprehension of the evidence adduced at trial. The court's recitation of the facts demonstrates that its conclusion that the goods were stolen had no basis in the record and was predi-

cated upon several significant misstatements of the evidence.

This Court has made it clear that a reviewing court is prohibited from making its own subjective determination of a defendant's guilt or innocence. *See: Jackson v. Virginia*, 443 U.S. 307, 319, n. 13 (1979). In reviewing a conviction, the question is not upon what evidence the jury *could* have found the defendant guilty but upon what evidence the jury *did* find the defendant guilty. *Cf: Eaton v. City of Tulsa*, 415 U.S. 697, 698-699 (1974). A discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained the conviction is grounds for reversal. *See: Dunn v. United States*, 442 U.S. 100, 106 (1979). Appellate courts are not free to revise the basis on which a defendant is convicted even if the same result likely would obtain on retrial. *Id.* at 107. In the present case, the Seventh Circuit ignored these mandates of this Court. In affirming petitioner's conviction based upon misstatements of the evidence adduced at trial, the court engaged in precisely the type of conduct this Court has forbidden—the subjective determination of a defendant's guilt or innocence. For this reason, also, the decision of the Seventh Circuit violated petitioner's right to due process.

The court's first significant misapprehension of the evidence adduced at trial was its statement: "several of the persons who stole parts from the Zenith plant testified at the trial." (App. A-6.) This statement was totally inaccurate. In fact, the government's failure to call these alleged thieves was one basis for petitioner's contention that the government failed to provide any competent evidence that the television parts were stolen. As discussed above, at trial the government failed to

call Dopson, Otis, Larry and Benny, the four alleged thieves. Moreover, Otis and Larry never were identified.

Although John Kimbrough, a Zenith employee, was called at trial, Kimbrough testified that he stole parts and attempted to bring them to a man named Benny. Kimbrough did not testify that he attempted to bring stolen parts to petitioner. Kimbrough was apprehended by his supervisor and agreed to work with the FBI to save his job. Zenith recovered the parts and resupplied Kimbrough with parts to sell to petitioner. As also discussed above, however, the case law is well established that a purchase under these circumstances does not constitute receipt of stolen goods.

The Seventh Circuit's second serious misapprehension of fact came in a subsequent statement which reinforced its erroneous notion that the "thieves" testified. The court stated:

> Also *two accomplices of other thieves Otis, Larry and Benny, testified* that they stole parts from the Zenith plant for these three men during the time these three men were delivering the stolen parts to appellant.

(App. A-7; Emphasis supplied.) Notably, the court failed to refer to any portion of the record which would indicate who these witnesses were and where their supposed testimony was elicited. Actually, the court's failure to identify the source of these "facts" is understandable because no "accomplices" ever so testified at trial.

Similarly, the court's statement that petitioner admitted ". . . to one of the thieves that he was dealing with a woman who was hustling for him by stealing Zenith parts in her purse" (App. A-5) is nowhere to be found in the record. In fact, the testimony of Shirley Robinson indicates that the court's statement is absolutely untrue

because Robinson never met nor did she know of petitioner.

The court's third significant misapprehension of the evidence was its gross generalization that John Urbanik ". . . testified extensively as to appellant's purchases of stolen parts from Zenith employees." (App. A-5.) As analyzed above, Urbanik's testimony was grounded primarily upon hearsay and was contradicted by other witnesses not called by the government.

Thus, the factual particulars and generalizations contained in the Seventh Circuit's order were an inaccurate picture of the testimony elicited at trial. The court's resulting conclusion that the television parts were stolen was predicated on a serious misapprehension of the facts. The Seventh Circuit found that the television parts described in Count II of the indictment were stolen based upon a misapprehension of the evidence adduced at trial. In this way, too, the court violated petitioner's right to due process.

Finally, granting the present petition or the alternative relief of remanding this cause to the Seventh Circuit with instructions to decide the issue previously raised on appeal is desirable in light of the widely reported concerns of many members of this Court regarding its ever-increasing workload. Exercise of this Court's supervisory powers will aid in eliminating subsequent decisions by United States courts of appeals, as occurred in the present case, which fail to address the issues presented for review or are based upon misstatements of the evidence adduced at trial. As a result, by exercising its supervisory powers this Court can stem the tide of additional requests for discretionary review on the grounds of the due process violation alleged above, which requests only will increase the heavy burden already shouldered by this Court.

II.

THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY THAT THE JURISDICTIONAL AMOUNT COULD BE ESTABLISHED BY CONSIDERING RETAIL VALUE AND THE SEVENTH CIRCUIT ALSO ERRED IN DETERMINING THAT VALUATION AT RETAIL WAS APPROPRIATE. BECAUSE PROPER VALUATION AT WHOLESALE COULD NOT SATISFY THE JURISDICTIONAL AMOUNT, PETITIONER'S CONVICTION SHOULD BE REVERSED.

The Government contended at trial that it could establish the $5,000 jurisdictional minimum, an essential element of a Section 2314 prosecution, merely by proving that the Zenith parts at issue had a value of $5,000 or more in the retail market.[5] Petitioner repeatedly objected to the government's theory of value, both during trial and at the instruction conference. (R. 720-721.) The trial court, however, accepted the government's position and instructed the jury:

> The word value means the face, par or market value, or cost price, *either wholesale or retail*, whichever is greater.[6]

(R. 802; Emphasis Supplied.)

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[5] Value for purposes of Section 2314 means:

> ". . . the face, par or market value, which ever is greater, and the aggregate value of all goods, wares and merchandise . . . referred to in a single indictment shall constitute the value thereof. 18 U.S.C. § 2311."

Section 2311 establishes value only in terms of "the face, par or market value" and does not mention retail or wholesale cost price.

[6] As the basis for this jury instruction the trial court relied upon certain Fifth Circuit cases presented by the government (R. 720-721) which had been overruled *sub silentio* in *United States v. Perry*, 638 F.2d 862 (5th Cir. 1981). In *Perry*, the con-

(Footnote continued on following page)

Instructing the jury that the retail price of the television parts could be used to satisfy the jurisdictional amount was error. Courts of Appeals which have considered the question of valuation for purposes of a Section 2314 prosecution uniformly have concluded that it is the type of the market in which a transaction occurs which dictates the valuation of the goods. *E.g.*: *United States v. Perry*, 638 F.2d 862 (5th Cir. 1981); *United States v. Berkwitt*, 619 F.2d 649 (7th Cir. 1980); *United States v. Whetzel*, 589 F.2d 707 (D.C. Cir. 1978); *United States v. Simpson*, 577 F.2d 78 (9th Cir. 1978); *United States v. Tippet*, 353 F.2d 335 (4th Cir. 1965).

Applying the standard employed by these circuits, there can be little dispute that the Zenith parts should have been valued according to their wholesale price. Although pursuant to the trial court's instruction the jurisdictional amount could be satisfied because the retail value of the goods was $5,262.91, retail was the incorrect standard by which to determine value.

The government's evidence unequivocally established that petitioner always purchased parts from Zenith at a price lower than retail. According to Seymour Davis, Zenith's Vice President and Operations Manager, individuals, like petitioner, in the business of repairing television sets purchased parts at the wholesale price. The evidence further showed that petitioner used these parts either for television repair or for resale to other television repair shops at a price lower than retail.

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[6] *continued*
victions were reversed because the goods, stolen in wholesale lots from a wholesaler, could not satisfy the jurisdictional minimum when appropriately valued at their wholesale price. At trial, the government had proved only the goods' retail value.

Although Zenith Distribution Corporation maintained a parts counter in its building to accommodate people who "come in off the street and want to buy Zenith parts or accessories" at retail, its primary function was to sell parts at wholesale to the television repair companies, dealers and service companies.[7] In addition, should Zenith have overstocked its supplies, parts could be sold in bulk. (R. 643.)

Because petitioner was a member of the class of persons engaged in television repair and service, he purchased parts at a wholesale price. Moreover, the evidence showed that when defendant sold parts to other television repair shops he did so at a price less than retail. Thus there was no basis whatsoever for valuing the Zenith parts at their retail price.

The wholesale price of the Zenith parts described in Count II of the indictment was substantially less than retail. The government never established the parts' wholesale price. The evidence, however, indicated that when properly valued at wholesale, the $5,000 jurisdictional minimum was not satisfied.

There was an additional deficiency in the government's valuation. Assuming, *arguendo*, that even a portion of the Zenith television parts which were shipped to Rochester, New York in November and December of 1976 were stolen, the evidence established that not all of the parts listed on the invoices were stolen. As discussed in Argument I, *supra*, Urbanik provided the only evidence that any of the goods were stolen and his testimony largely

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[7] That Zenith Distributing Corporation sold in excess of $100,000 in parts at their retail price is not controlling. No evidence of Zenith's international sale of parts was presented. Common sense, however, dictates that, for Zenith, sales of $100,000 were quite nominal.

was uncorroborated hearsay and therefore incompetent to establish that the goods were stolen. Moreover, even Urbanik had to "estimate" which parts actually were stolen. It therefore was improper to aggregate the value of all of the items, legitimate and allegedly stolen, to satisfy the jurisdictional amount. *Anderson v. United States*, 406 F.2d 529, 534 (8th Cir. 1969). The government never cured this defect in its proof.

The government's inability to establish concretely that the value of the goods exceeded $5,000 is fatal to a Section 2314 prosecution. For example, in *United States v. Perry*, 638 F.2d at 838 n. 2, the F.B.I. agent admitted that he only could provide an "estimate of the actual quantity of the stolen goods." As a result, the court concluded that the evidence was insufficient to support a jury finding that the requisite "jurisdictional" amount was proved. *Id.* at 869. *Accord*: *United States v. Chandler*, 586 F.2d 593 (5th Cir. 1978).

On appeal, petitioner urged reversal of his conviction based on the argument set forth above. In rejecting his claim, the Seventh Circuit misapprehended the facts elicited at trial concerning Zenith's wholesale sales and misapplied the law of the valuation of stolen goods for establishing the jurisdictional amount.

Initially, the Seventh Circuit stated:

> Zenith sold parts in both the retail and wholesale markets. Defendant did not establish that the parts in issue would not have been sold in the retail market.

(App. A-8.) It is axiomatic that in a criminal case a defendant need not prove anything at all. It is the government's burden to prove beyond a reasonable doubt the defendant's guilt. That burden never shifts. It was not petitioner's burden to establish that the parts would not

have been sold in the retail market. It was the government's burden to prove beyond a reasonable doubt that the parts would not have been sold in the wholesale market. This the government failed to do.

Further, the Seventh Circuit concluded that petitioner "would not have been eligible to purchase [Zenith parts] at wholesale prices." (App. A-9.) This, too, was a complete misapprehension of the evidence adduced at trial. As discussed above, Seymour Davis testified that if the purchaser is "in the business of servicing television sets" the parts were sold to the purchaser at wholesale. (R. 643.) Petitioner was known to Zenith through his prior legitimate purchases to which Urbanik testified. Even the court's Order notes that petitioner owned and operated a television repair shop. (App. A-4.) Thus, contrary to the Seventh Circuit's conclusion, petitioner was entitled to purchase Zenith parts at wholesale.

The Seventh Circuit then incorrectly applied the law of the valuation of stolen goods when it concluded that the wholesale price was inappropriate because the goods were "sold by individual pieces and not in wholesale lots." (App. A-8.) In support of its conclusion that the relevant market was the retail market, the court referred to unspecified portions of the testimony of Robert Ballent, Zenith's Manager of Operations Analysis. However, absolutely no evidence was presented through Ballent or any other witness which established that to qualify for the wholesale price goods had to be purchased in wholesale lots.

Moreover, the case law in no way supports the Seventh Circuit's novel proposition that for the wholesale value to be considered, goods must be sold in wholesale lots. The case law does not turn on the type of packaging of the

items held out for sale. Rather, the identification of the market (from whom the goods were stolen) is controlling.

For example, in *United States v. Tippet*, 353 F.2d 335, the Fourth Circuit applied the wholesale value to the approximately 260 tires stolen from a tire wholesaler even though there was no indication that the tires were stolen in "wholesale lots."[8]

As stated in *United States v. Berkwitt*, 619 F.2d 649 (7th Cir. 1980), the market value must be determined by the price a willing buyer would pay a willing seller either at the time and the place the property was stolen or any time during the receipt or concealment of the property. This standard simply was not applied to the issue raised by petitioner on appeal. Instead the court focused upon the packaging of the items as somehow controlling. There simply is no basis for the Seventh Circuit's analysis.

In light of the testimony that the function of the Zenith Distributing Corporation was to serve TV repair companies like petitioner's and dealers at wholesale and to serve the general public only as an accommodation, the relevant market was wholesale; the wholesale price was the price a willing buyer would pay a willing seller, regardless of the manner in which the goods were packaged. The actual value of the parts using the wholesale valuation, although never established by the government, would have been well below the $5,000 jurisdictional minimum.

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[8] It should be noted that the Seventh Circuit erroneously cited *Tippet* for the proposition that the goods in that case were stolen "in wholesale lots from a wholesaler." (App. A-9.) Indeed, the goods were stolen from a wholesaler but, as noted above, there was no indication that they were stolen in "wholesale lots."

Thus, the trial court erred in instructing the jury that the jurisdictional amount could be satisfied by considering the parts' retail value. The Seventh Circuit also erred in concluding that the parts should be valued at retail. Because valuation of the parts at wholesale would not have satisfied the $5,000 jurisdictional minimum, petitioner's conviction on Count II should be reversed.

III.

BECAUSE THE GOVERNMENT FAILED TO PROVE THAT PETITIONER AGREED TO COMMIT ACTS WHICH INCLUDED ALL OF THE ELEMENTS OF A CRIME UNDER SECTION 2314, HIS CONVICTION FOR CONSPIRACY TO VIOLATE SECTION 2314 CANNOT STAND.

The essence of the crime of conspiracy is the agreement. *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1976) *cert. denied* 379 U.S. 960. The intended future conduct agreed upon must include *all* of the essential elements of a federal substantive offense. *United States v. Pepe*, 512 F.2d 1129, 1132 (3d Cir. 1975). The essential element of a conspiracy to violate Section 2314 includes an agreement between two or more persons to transport in interstate commerce goods with a value of $5,000 or more and any overt act done in furtherance of the agreement. *United States v. Rose*, 590 F.2d 232, 235 (7th Cir. 1978).

Assuming, *arguendo*, the evidence proved that petitioner agreed to ship stolen goods interstate, the government failed to prove that the agreement encompassed targeted goods with a value of $5,000 or more. Value is an essential element of Section 2314. Because the evidence did not establish that petitioner agreed to a plan which included this essential element of value, his conviction of conspiracy to violate Section 2314 should be reversed.

Petitioner does not suggest that in a prosecution for conspiracy to violate Section 2314 the government must prove that the goods actually shipped had a value in excess of $5,000. The evidence, however, must show that there was an agreement to engage in the transportation of targeted goods which reasonably could be expected to have a value in excess of $5,000. *United States v. Pepe*, 512 F.2d at 1132. Because the conspiratorial agreement is not usually susceptible to direct proof, circumstantial evidence may be relied upon to prove the agreement and the guilty knowledge. Such knowledge may be inferred from circumstances and the acts and conduct of the parties. The proof, however, must be "clear and unequivocal." *United States v. Solomon*, 422 F.2d 1111, 1112 (7th Cir. 1970). As will be demonstrated below, there was no proof that petitioner agreed to commit a violation of Section 2314.

There was no evidence that during the pendency of the alleged conspiracy petitioner agreed to transport targeted goods with a value in excess of $5,000. Proof of the fair market value of goods actually stolen is the only indicator available to assess from circumstantial evidence the elements of the agreement. The evidence established that the goods, if they were stolen, were taken in a wholesale market. There was no evidence of the goods' wholesale value. Further, there was no evidence as to which goods, if any, were stolen and which goods were part of the legitimate inventory. Similarly, there was no evidence that stolen goods were shipped to Rochester together with legitimately purchased goods. Without the use of speculation, therefore, it was impossible to compute the value of the stolen goods, if any, shipped interstate. This was insufficient. Although circumstantial evidence need not exclude every reasonable hypothesis consistent with inno-

cence to support a conviction of conspiracy, the evidence must rise above mere speculation and conjecture—it must suffice to prove the element of conspiracy beyond a reasonable doubt. *United States v. Pepe*, 512 F.2d at 1134. In the present case, because the value of stolen goods, if any, shipped interstate during the pendency of the conspiracy could not be established, there was no evidence that petitioner intended to agree to transport interstate stolen goods with a value in excess of $5,000.

Petitioner's conviction for conspiracy (Count I), therefore, should be reversed because even assuming, *arguendo*, that some sort of conspiracy was proved, a conspiracy to commit a federal crime was not proved. The government failed to prove specific knowledge of the factual circumstances conferring jurisdiction, to wit: that petitioner agreed to transport in interstate commerce stolen goods with a value in excess of $5,000.

CONCLUSION

For the reasons set forth above, LEONARD VALENTE urges that his petition for a writ of certiorari be granted or, in the alternative, that this Court exercise its supervisory powers and remand this cause to the United States Court of Appeals for the Seventh Circuit with instructions that the court address and decide the issue previously raised by petitioner on appeal.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED SEPTEMBER 13, 1982)
November 17, 1982

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. PAUL C. WEICK, *Senior Judge**
Hon. RICHARD D. CUDAHY, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-1404 *vs.*

LEONARD LEE, a/k/a LEONARD VALENTE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 689
Honorable **Charles P. Kocoras**, *Judge Presiding.*

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* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

ORDER

Defendant-Appellant Leonard Lee, also known as, Leonard Valente, has appealed to this court from a judgment of conviction entered upon the verdict of a jury finding him guilty of two counts of an indictment, the first count charging him with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 by knowingly, willfully and unlawfully transporting stolen goods in interstate commerce in violation of 18 U.S.C. 2314, and the second count of the indictment charging him with the substantive offense of transporting the stolen goods in interstate commerce. He was sentenced to five years of imprisonment on count one of the indictment and seven years on count two. The sentence on count two was to run concurrently with the sentence on count one and execution was stayed pending appeal. Exhibit B attached as appendix to appellant's brief.[1]

In his Statement Of The Question On Appeal, appellant states:

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[1] The red cover on the brief of the United States erroneously designates the United States, instead of Valente, as appellant. Its Statement of the Case on page 2 of its brief erroneously states:

> . . . appellant was convicted of interstate transportation of stolen property, in violation of 18 U.S.C. 2314 (count one) and conspiracy to commit that offense, in violation of 18 U.S.C. 371 (count two). The district court sentenced him to concurrent terms of seven years' imprisonment on count one and five years' imprisonment on count two (R. 31).

As is apparent from the first paragraph of this Opinion, the Statement of the Case conflicts with the Judgment And Commitment Order attached to Appellant's brief as Exhibit B, where the sentence on the conspiracy count one of the indictment is stated as five years and the sentence on the substantive offense charged in count two is stated as seven years. In this appeal, we are bound only by the commitment order stated in Exhibit B.

Whether the Government proved the corpus delecti of the offenses charged.

1. The Government failed to prove beyond a reasonable doubt that the merchandise described in Count II of the Indictment was stolen property.
2. The Government failed to prove the merchandise described in Count II of the Indictment had a fair market value of $5,000 or more and thus, the jurisdictional minimum was not established.
3. The Government failed to prove that Defendant agreed to commit acts which included all of the elements of a crime under Section 2314. As a result, Defendant's conviction cannot stand.

This challenges the sufficiency of the evidence to support the verdict of the jury. The rule to be followed by an appellate court in determining this issue was well stated by the Supreme Court in *Glasser v. United States*, 315 U.S. 60 (1942), where the court stated on page 80:

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States v. Manton*, 107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and a collocation of circumstances." *United States v. Manton, supra.* We are clear that, from the circumstances outlined above, the jury could infer the existence of a conspiracy and the participation of Roth in it.

United States v. Scott, 578 F. 2d 1186, 1192 (6th Cir.), *cert. denied*, 99 S. Ct. 201 (1978). As we will show below, there was abundant evidence to support the verdict of the jury with respect to all of the issues. We affirm.

I

The Facts

The defendant owned and operated Color Television Research, which was a television repair shop located in Dolton, Illinois. Prior to the thefts of television parts from Zenith Radio Corporation, defendant was engaged principally in the repair of television sets which he did not buy or sell and did not buy or sell the television parts, except when necessary to repair the sets.

The case involves a large amount of television parts stolen from Zenith by its employees in the Chicago area and sold by the thieves at low prices to defendant, who in turn sold and shipped them in interstate commerce to Tuner Service Corporation of Rochester, New York, owned by Gregory Campbell. Tuner purchased the stolen parts from defendant at prices far below the retail value thereof.[2]

The office manager of appellant was John Urbanik who had authority including ordering, billing, invoice preparation, reconciliation of bank statements and the corporate books and records. In his brief appellant states:

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[2] Mr. Campbell of Tuner testified at the trial and admitted that the prices he paid appellant for the parts were more favorable than any other price at which he could have obtained them. (Tr. 493). Campbell also testified that he had inquired of appellant as to where appellant had obtained the parts. On one occasion, appellant advised Campbell that he had purchased them from a bankrupt Zenith distributor. On another occasion, appellant told Campbell that the parts came from a train wreck and on still another occasion they came from an undisclosed California source. (Tr. 494). Campbell also testified that Urbanik later told Campbell that the parts which Campbell had purchased from appellant had been stolen. (Tr. 506, 507).

Appellant in discussing his career with Campbell told Campbell how he had been milking the public in the operation of his television repair business. (Tr. 502).

Mr. Urbanik testified to an extensive prior criminal record. (R. 266-267). At the time of the Defendant's trial, he was serving a 25 year prison sentence. (R. 269).

Urbanik was called to the witness stand by the government and testified extensively as to appellant's purchases of stolen parts from Zenith employees and appellant's sales of the stolen parts to Tuner Service Corporation in Rochester, New York. It started in mid-July 1976, when appellant began to make purchases of stolen parts from Michael Dopson, a Zenith employee, who related to Urbanik and appellant how he stole the parts. Dopson made delivery of the stolen parts to appellant at appellant's shop at least eight times. The deliveries were made at night and appellant paid Dopson in cash for the parts and at prices much lower than the retail price. Dopson received from appellant between $5,000 and $8,000 for the stolen parts. Appellant would give Dopson a list of the parts he needed, which would then be provided by Dopson whenever he could. On one occasion when Urbanik suggested a particular part for Dopson to steal, appellant told Urbanik not to use the word "steal" but to use the words "pick up" or "obtain". Dopson ceased filling orders in August. Appellant explained to Urbanik that Dopson had been fired.

Appellant then commenced to purchase stolen Zenith parts from three other Zenith employees Otis, Larry and Benny. They brought the parts to appellant's shop about twice a week and in the evenings and received payments in cash from appellant at prices slightly lower than appellant paid Dopson.

Otis and Larry explained to appellant and Urbanik that they were helped to steal by a woman known as "The Purse" in getting parts out of the Zenith factory. She would put the parts in her handbag and walk past the security guard, who did not bother her. Appellant admitted to one of the thieves that he was dealing with a woman who was hustling for him by stealing Zenith parts in her purse.

Several of the persons who stole parts from the Zenith plant testified at the trial. There was also evidence that in June 1976, appellant purchased a number of parts from Zenith employee, Chuck Gasperino, for a very low price for which he paid Gasperino $3,000 in cash.

The court also admitted evidence that during the same time that these offenses were being committed, appellant was involved in purchasing stolen property from other sources on two other occasions. This evidence was admitted on the issues of knowledge and intent and the court so instructed the jury.

Campbell of Tuner paid appellant $6,911.35 for the stolen parts he purchased.

II

Sufficiency of the Evidence

(a) That the property transported in interstate commerce was stolen.

As before stated in determining the sufficiency of the evidence to support the verdict of the jury, we are required to view the evidence, as well as the inferences properly deducible therefrom, in the most favorable light to the government. "Participation in a criminal conspiracy need not be proven by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances". *Glasser v. United States, supra.*

In our opinion, it was established by overwhelming uncontroverted evidence that every Zenith part shipped to Tuner Service Corporation in Rochester, New York, between August and December was stolen. All except two or three items sent to Rochester in July were stolen. The only parts not stolen were a Motorola chassis sold to Tuner in November, 1976 for $75 and "two or three" Zenith parts shipped in July, which could have come from the shop's legitimate inventory. This was testified to by Urbanik. As heretofore shown, Dopson who was the first of the thieves, admitted to Urbanik and Valente that

he was stealing the parts from the Zenith plant by sneaking them out in his truck. Also two accomplices of other thieves Otis, Larry and Benny, testified that they stole parts from the Zenith plant for these three men during the time these men were delivering the stolen parts to appellant.

Actually, it was not necessary for the purposes of the conspiracy count one for the government to prove that the parts were stolen so long as the proof showed that appellant and at least one of his co-conspirators believed that they were stolen.

It is also noteworthy that none of the purchases made by appellant from the thieves was made in the regular and ordinary course of business. The parts were delivered in pieces at night and were paid for in cash. The thieves admitted to appellant and to Urbanik that they had stolen the parts from Zenith and told them how they stole the parts. The prices they paid the thieves were much less than the retail value thereof and appellant was able to sell the stolen property to Campbell of Tuner at a handsome profit. All of these circumstances tend to prove the guilt of appellant.

(b) That the value of the property transported in interstate commerce was worth more than $5,000.

In his brief, appellant admits:

The retail value of the goods delivered to Rochester from November 20 through December, 1976 was $5,-262.91.

This was the retail value placed upon the invoices for the parts shipped by appellant to Tuner between those dates by the testimony of Robert Ballent, Manager, of Operations Analysis of Zenith Radio Corporation and he should know. The jury obviously believed him.

Appellant contends that either the Zenith subsidiary distributor's prices charged them by Zenith Radio Corporation which was much less should be used, or the wholesale price or the price actually paid by Tuner Ser-

vice should be used. In our opinion, none of the prices suggested by appellant is appropriate.

The National Stolen Property Act, 18 U.S.C. 2314 defines "value" as "the face, par, or market value, whichever is the greatest. . . ." 18 U.S.C. 2311.

In our opinion, the prices charged by the parent corporation Zenith Radio Corporation on its books to its wholly owned corporate subsidiary, Zenith Distributing Corporation, which is referred to as "distributor net price" and is much lower than the retail prices would not be appropriate. It is merely a bookkeeping entry. Zenith Distributing Corporation sells the parts to the public ordinarily at the suggested retail price.

Nor would the wholesale prices at which such parts are sold be appropriate. The parts that were transported to Rochester in November and December, 1976, were stolen and sold by individual pieces and not in wholesale lots. Therefore, the relevant market from which to determine value was the retail market in Zenith parts. It is the price at which a legitimate seller would sell the parts to a willing buyer. This was established by the testimony of Robert Ballent, Manager of Operations Analysis of Zenith. Nor should the prices paid by Tuner to appellant for the stolen property be used. Mr. Campbell of Tuner testified as to his efforts to find out from appellant how he obtained the parts and was given various inconsistent answers by appellant. He finally learned from Urbanik that the goods he purchased from appellant had been stolen. Zenith sold parts in both the retail and wholesale markets. Defendant did not establish that the parts in issue would not have been sold in the retail market.

This court indicated in *United States v. Berkwitt*, 619 F. 2d 649 at page 658 (7th Cir. 1980), that the $5,000 limitation in Section 2314 "was not intended to protect those who transport stolen property but to avoid overtaxing the Department of Justice." Certainly the law does not require that stolen goods be valued at their black market price. *Cf.* 557 F. 2d 1316, 1331, 1332 (9th Cir. 1977), *cert. denied*, 436 U.S. 904.

The wholesale price was used only in sales by dealers who do continuing business with Zenith. Appellant, Tuner or Tuner's ultimate customers would not have been eligible to purchase at wholesale prices. The parts transported to Tuner could be expected to compete with Zenith parts being sold in the retail market and it was appropriate to use the retail price of those parts as their value. *Cf. United States v. Neary*, 552 F. 2d 1184, 1189 (7th Cir. 1977), *cert. denied*, 434 U.S. 864 (1977). Cases involving goods stolen in wholesale lots from a wholesaler relied upon by appellant are inappropriate. *Cf. United States v. Perry*, 638 F. 2d 862, 865 (5th Cir. 1981); *United States v. Tippett*, 353 F. 2d 335 (4th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

III

In our opinion, the evidence was sufficient to support the verdict of the jury on the conspiracy count. As to value, this involved all of the shipments to Tuner which it paid substantially more than the $5,000 statutory requirement, namely, more than $6,700.

The government was not required to prove that the value of the stolen goods was actually more than $5,000, for the purposes of the conspiracy count, only that appellant believed that the value exceeded that amount which he certainly must have believed when he charged more than $6,700. *Cf. United States v. Tombrello*, 666 F. 2d 485, 489 (11th Cir. 1982).

The judgment of conviction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 9, 1983

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. PAUL C. WEICK, *Senior Circuit Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-1404 *vs.*

LEONARD LEE, a/k/a LEONARD VALENTE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 CR 689
Charles P. Kocoras, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant Leonard Lee, all of the judges on the original panel having voted to deny the same,

It is hereby ordered that the aforesaid petition for rehearing be, and the same is, DENIED.

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* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.